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In the Supreme Court of the United States

—— Term, 19—

No. 404

RUFUS BEACHAM,

Appellant,

vs.

MARTIN BRATERMAN, et al.,

Appellees,

On Appeal from the United States District Court for the Southern District of Florida.

JURISDICTIONAL STATEMENT

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RUFUS BEACHAM,

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vs.

MARTIN BRATERMAN, et al.,

Appellees,

On Appeal from the United States District Court for the Southern District of Florida.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Three Judge Federal District Court of the Southern District of Florida, entered on April 30, 1969, dismissing the Appellant-Plaintiff's cause of action, and submits this Statement to show that the appeal is within the jurisdiction of the Supreme Court of the United States and that a substantial question is presented.

OPINION BELOW

The opinion of the Southern District Court is not yet reported. A copy of that opinion is attached hereto as Appendix A.

JURISDICTION

This suit was brought under 42 U.S.C. §1983 to contest the constitutionality of certain Florida Statutory provisions which act to keep most convicted felons from voting. A three judge court was properly empaneled under 28 U.S.C. §2281 to hear the case because a substantial attack on the constitutionality of state statutes was involved and injunctive relief was requested. (See Appendix B for order entered August 30, 1968 taking jurisdiction, denying defendant's motion to dismiss and stating that the question is a proper one for a three judge court.) The final judgment of the court below was filed April 30, 1969, and Notice of Appeal was filed in that court on May 26, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, U.S.C. §§1253, 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *Flast v. Cohen*, _____ U.S. _____, 88 S. Ct. 1942 (1968); *Radio Corp. of America v. United States*, 341 U.S. 412 (1950); *Loeb v. Trustees of Columbia*, 179 U. S. 472 (1900).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

A. Under the separation of powers doctrine, as it applies to federal courts, is a federal court bound to apply the doctrine to State governments or only to branches of the Federal government?

B. Can the right to vote, a basic right of citizenship, be regulated and *prohibited* by means of bringing it under the state executive's "pardon power"?

C. Does not the procedure outlined in Florida Statutes §940.05, the Florida Constitution, Art. IV, §8, and the regulations of the body formerly known as the Pardon Board, violate the Constitution in that there are no ascertainable standards governing the recovery of the fundamental right to vote?

D. Does not the taking away of the right to vote from convicted felons by *implication* (*i.e.*, there is no civil death statute in Florida) amount to a taking of a fundamental right and part of one's liberty without due process of law?

E. Are Florida Statutes §97.041 (5) (d) and the Florida Constitution, Art. VI, §4, insofar as they automatically and indefinitely disenfranchise all convicted felons, regardless of their crime, facially unconstitutional?

F. Do Florida Statutes §97.041(5) (d) and the Florida Constitution, Art. VI, §4, insofar as they affect only those convicted felons whose civil rights have not been restored, violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment because they treat members of the same class unequally?

STATUTES INVOLVED

Set forth in Appendix C are: Florida Statutes §§97.041, 940.05 and Florida Constitution, Art. VI, §4, Art. IV §8.

STATEMENT

The Plaintiff below was convicted on two occasions of marijuana violations which are felonies under Florida law. In the spring of 1968 he applied to the Board of Pardons of the State of Florida for a pardon which would have removed all civil liabilities flowing from his convictions. That request was denied on March 13, 1968. Later, in attempting to register to vote, he was informed by agents of the Defendant-Appellee Braterman, that as a convicted felon he could not register to vote unless his civil rights had been restored. On 1968, this suit was filed by the Appellant. It was styled "on his own behalf and on behalf of all others similarly situated" and was filed in accordance with Federal Rules of Civil Procedure, Rule 23 for class actions. On July 30, 1968, the appellees filed a Motion to Dismiss and suggestion that the convening of a three judge court was unnecessary. Preliminary arguments were heard by the single district judge, J. Joe Eaton, who entered an order on August 30, 1968, which acknowledged that the case had been filed as a class action, took jurisdiction in the case, denied the Motion to Dismiss, and held that the case should be heard by a three judge court under 28 U.S.C. §2281. The original complaint in the action was amended on December 23, 1968 to incorporate changes in nomenclature established in the new Florida Constitution. After being thoroughly briefed, final arguments on the merits were heard by the three judge court on March 21, 1969. Opinion was rendered dismissing the cause on April 30, 1969. That opinion was grounded in an acceptance of the Attorney General's arguments that the restoration of the right to vote to convicted felons is part and parcel of the pardon power and thus beyond the scope of judicial review. The court

further found that the case was not properly before the court as a class action because of the appellant's failure to abide strictly with the procedural steps outlined in Rule 23(c) (2) and (3).

THE QUESTIONS ARE SUBSTANTIAL

The Court below grounded the major portion of its dismissal on two premises that Appellant contends are mistaken. The Court stated that: (1) "The restoration of civil rights is part of the pardon power and (2) as such is an act of executive clemency not subject to judicial control." Certainly, Appellant concedes that the pardon power has traditionally been conceived as beyond judicial review in its application to individual petitioners for clemency. This is not to say that any or all rights of citizenship can be arbitrarily brought under the "pardon umbrella" and then dispensed back to the citizenry at the discretion of the executive branch of the government. Nor is it to say that the system by which fundamental rights are withheld or granted to groups of citizens is totally immune to judicial scrutiny. Why should the mere labeling of an act as "part of the pardon power" magically screen that act from the tests of the Constitution? It is assumed that this comes about through the workings of the separation of powers doctrine. Under this historical tri-compartmentalization of our government, the federal courts have exercised a constitutionally imposed restraint when examining things which are exclusively of federal legislative or executive concern. This doctrine is one designed for use between three equal parts: the judicial, legislative, and executive branches of the federal government. It is not meant to be applied to the subordinate entities within state government:

> "Plaintiff refers to no authority and we know of none, to the effect that the Constitution of the United States imposes the same requirements of separation of government functions on the states that it does on the national government. Indeed, the Supreme Court has expressly held the contrary." *Benoit v. Gardner*, 351, F.2d 846, 849 5th Cir. 1965).

The Supreme Court case cited was *Dreyer v. Illinois*, 187 U.S. 71 (1802). In that case the court examined at length the constitutionality of the Illinois Indeterminant Sentence Act which "in effect, invests them (the state courts and Board of Pardons) with the pardoning power of the executive." The Court proceeded with an inquiry as to whether the due process clause of the Fourteenth Amendment had been respected by the State. No hesitancy was shown in reaching the merits despite the fact that the Statute in question was part of the pardon apparatus of the State.

Whatever partial application of the separation of powers doctrine to the States may have crept into case law, it must be viewed in perspective. It is but a "concept of federalism: *i.e.*, federal respect for state institutions, (and) will not be permitted to shield an invasion of the citizen's constitutional rights." *Jordan v. Hutcheson*, 323 F.2d 597, 601 (4th Cir. 1963).

> "In protecting the constitutional rights of individuals vis-a-vis state action, the federal courts are not concerned with the division of legislative, executive and judicial functions within the governmental structure of the state. As heretofore

pointed out, it is the doctrine of federalism; *i.e.*, federal respect for the institutions of state governments, which causes our courts to move with care in this direction. Separation of powers is, however, the principle involved when federal courts come to consider the activities of the legislative branch of the federal government. While these cases may be relevant . . . they are not authority for treatment of the rights of the Plaintiffs here under the provisions of the Fourteenth Amendment or under the provisions of 42 U.S.C.A. §1983, where an equitable remedy is specifically granted against action under color of state law without any limitations as to the form which that action may take, whether legislative, executive or judicial. *Id.* at 604-605.

* * * * * * *

"In summary, we would agree with the district judge that no federal court should enjoin a state legislative committee *so long as* it is acting within the scope of the authority granted it by the legislature and *its actions are not interdicted by the Constitution of the United States.* However legitimate the committee's interest . . ., the committee may not under the guise of investigating such activity invade the plaintiff's First Amendment rights without a showing of compelling state interest which is not, of course, evident on this record to date." *Id.* at 605-606.

(Emphasis supplied.)

Long ago, this Court recognized that there are finite limits to the reach of even the pardon power. "However large, therefore, may be the power of pardon pos-

sessed by the President, and however extended may be its application there is this limit to it . . ." that it cannot touch Treasury monies *Knote v. United States*, 95 U.S. 149, 154 (1877). When the pardon power comes in direct conflict with basic constitutional rights of citizens, there, too, a limit to its reach must exist. *See Dreyer v. Illinois*, *supra*, and *In Re Nevitt*, 117 F. 448, 459 (8th Cir. 1902): "The power of the President to grant reprieves and pardons of offenses against the United States does not extend to him the authority to release or destroy the civil rights of private individuals . . ." The fact that the separation of powers doctrine is not applied to the States and that the pardon power of a governor is not treated in the same manner in federal courts as that of the President has surely been recognized by members of this Court. (The cases cited by the court below as endorsing the immunity of the pardon power from judicial review largely dealt with the *federal* pardon power of the President, *see Bishop v. United States*, 223 F.2d 582 (D.C. Cir. 1955), *rev'd*, 350 U.S. 961 (1956); *Yelvington v. Presidential Pardon & Parole Authorities*, 211 F.2d 642 (D.C. Cir. 1954); *Bozel v. United States*, 139 F.2d 153 (6th Cir. 1943), *cert. denied*, 321 U.S. 800 (1944), *rehearing denied*, 322 U.S. 768 (1944). The two other examples in that section by the court involved individual pleas for clemency rather than a constitutional attack against the system itself. Logically, the courts chose to disassociate themselves from the efforts of single petitioners who were incarcerated to either get a death sentence commuted to life term *(Davis v. State of North Carolina*, 339 F.2d 770, (4th Cir. 1964), *rev'd on other grounds*, 384 U. S. 737 (1966) or to make initial application for pardon and release from jail *(United States v. Patti*, 291 F.2d 745

(3d Cir. 1961).) In *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), the Court stated once more that there is no constitutional mandate which holds the States to the federal separation of powers standard. Both the concurring opinion and the dissent disagreed with the thrust of the majority because of their authors' belief that the majority opinion made possible judicial review of the "internal affairs" of the State, including "whether the State's chief executive should have the pardoning power." *Id.* at 268, 257.

If "even the war power (of Congress) does not remove constitutional limitations safeguarding essential liberties.' *Home Bldg. & Loan Assoc. v. Blaisdell*, 290 U.S. 398, 426 . . . (1934)," *United States v. Robel*, 389 U.S. 258, 264 (1967) (C. J. Warren), it seems unlikely that the pardon power of the State executive should be more thoroughly insulated from judicial review. "(T)he phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *Id.* at 263, 264. Neither can substantial invasions of the constitutionally protected right to vote be condoned because of an executive or legislative assertion that the invasion is "part of the pardon power." It is this Court's "delicate and difficult task," *Schneider v. State of New Jersey*, 308 U.S. 147, 161 (1939); to weigh traditional expressions of governmental interests against the simple fact that citizens are deprived for life of the right to vote. Only if the state's interest is "overriding" and "compelling" should the state's interest prevail. *Bates v. City of Little Rock*, 361 U.S. 516 (1960). In that consideration, Madison's words in *The Federalist*, No. XLV are especially pertinent:

> "Was, then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States . . . might enjoy a certain extent of power and be arrayed with certain dignities and attributes of power? . . . (A)s far as the Sovereignity of the States cannot be reconciled with the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter."

Thus the question may well be: what constitutional right, if any, does the convicted felon have to vote? Historically, no such right was recognized. *See* Note, *The Ex-Convicts Right to Vote*, 40 S. Cal. L. Rev. 148, 155 (1967); Note, *Civil Disabilities of Felons*, 53 U. Va. L. Rev. 403, 406-408 (1967); McGovney, *The American Suffrage Medley* 1-17 (1949). Yet, to stop there, would be to ignore a legal revolution that has quietly but surely occurred during the last decade in the voting rights arena. Since the recent apportionment and open suffrage cases, the Fourteenth Amendment has been used again and again to strike down unconstitutional state practices in the election/voting field. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641 (1966), *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Louisiana v. United States*, 380 U.S. 145 (1965); *Carrington v. Rash*, 380 U.S. 89 (1965); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*; 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). For an excellent summary of the recent decisions which firmly establish the right to vote as "fundamental," *see*

United States v. State of Texas, 252 F.Supp. 234 (W.D. Tex. 1966) (3 judge court), *aff'd*, 86 S. Ct. 1383. In the face of the constitutional evolution explicit in these cases, previous cases which did not seriously consider the impact of the equal protection clause on voting simply cannot be controlling. Note, *The Equal Protection Clause as a Limitation on the States Power to Disfranchise Those Convicted of a Crime*, 21 Rutgers L. Rev. 297, 305-307 (1967).

Once the right to vote has been characterized as a fundamental right, the constitutional analysis demands a "compelling state interest" and legislation which is drafted with "narrow specificity," that is regulation which is "carefully confined." *Harper v. Virginia Board of Elections*, *supra* at 670. In the present case, no state interest was put forth, much less a "compelling" one. The Florida courts have offered the only statement of purpose available. They viewed disfranchisement as a continuing punishment.

> "Imprisonment and hard labor are not the only punishments which the law inflicts on those who violate its commands. Besides these are disabilities which are the consequences of conviction and which remain after incarceration has ceased. *Singleton v. State*, 38 Fla. 297, 21 So. 21 (1896)."

It is difficult to accept a penal justification for the deprivation of the right to vote. In *Trop v. Dulles*, 356 U.S. 86, 96 (1958), Chief Justice Warren used the deprivation of the felon's right to vote as an example of a non-penal regulation. It was evident from the context of the illustration that had the regulation been for the purpose of punishment it would most probably be invalid as cruel and unusual punishment. *Id.* at 100-103. *Accord, Otsuka*

v. Hite, 51 Cal. Rptr. 284, 414 P.2d 412, 416 (1966) which rejected the class of "felons" as an invalid one for the purpose of protecting the electoral system:

> "Defendant's proposed construction of 'infamous crime' to include any and all felonies would . . . sweep into its ambit malum prohibitum conduct which is but little detrimental to society at large and is totally unrelated to the goal of preservation of the integrity of the elective process. *Id.* at 419.
>
> "Rather, the inquiry must focus more precisely on the nature of the crime itself, and determine whether the elements of the crime are such that he who has committed it may reasonably be deemed to constitute a threat to the integrity of the elective process." *Id.* at 422.

The Opinion of the California Supreme Court in *Otsuka* focused on the irrationality and overinclusiveness of "felons" as a class. The United States Supreme Court has instructed us that state-imposed limitations on the right to exercise suffrage must be drawn with narrow specifity and "be germane to the intelligent exercise of the franchise." *Harper, supra.* There is nothing suggesting narrow specificity about Florida's disqualification from suffrage of anyone who has been convicted of a felony. In Florida, the class of felonies is based solely on the place of possible incarceration:

> "The term felony whenever it may occur in this Constitution or in the laws of the State, shall be construed to mean any criminal offense punishable with death or imprisonment in the State Penitentiary." Fla. Const., Art. XVI, §25.

The blatant arbitrariness of such a classification as a means of disenfranchisement need not be belabored. *See* Plaintiff's Memorandum in Support of Permanent Injunction and Declaratory Relief, pp. 18-22. Obviously not all states have found such across-the-board measures necessary to protect their elective systems. At least sixteen states, *id.* at 22, have used far less drastic exclusions.

Lifetime deprivations of the vote are especially repugnant when one realizes that the vast majority of first time felons are in their early twenties and that the average age for all felons is considerably under thirty. Gleaser, *The Effectiveness of a Prison and Parole System* 469 (1964). The youthful offender is assumed to be corrupt after his offense. Any reasonable relationship between the crime and corruption of the election process may well be long since dissipated, but the individual continues in a state of deprived citizenship.

Actually, the convicted felon is not absolutely barred from voting for life. Under Florida Statutes §97.041 (5)(d) ("Qualifications to Register" of the Florida Law on Electors and Elections):

> "The following persons are not entitled to vote:... (d) persons convicted of any felony by any court of record and *whose civil rights have not been restored*." (Emphasis supplied.)

Thus, the State of Florida gives the right to vote to some felons while withholding it from others. This is a classic equal protection breach. People in identical circumstances are treated differently via statute. Some people are forced by law to forego a constitutionally protected right that others similarly situated are allowed to exercise.

> "When the law lays an unequal hand on those who have committed instrinsically the same quality offense . . . it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner Oklahoma*, 316 U.S. 535, 541 (1942).

See also Louisiana v. United States, supra:

> "The cherished right of people in a country like ours to vote cannot be obliterated by the use of laws like this, which leave the voting fate of a citizen to the passing whim or impulse of an individual registrar. Many of our cases have pointed out that invalidity of laws so completely devoid of standards and restraints. *See, e.g., United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A.L.R. 1045."

The procedure by which convicted felons are given the right to vote in Florida violates the due process clause of the Fourteenth Amendment because it is so vague and standardless that it leaves applicants uncertain as to necessary conduct and requirements to have their civil rights restored.

As Mr. Justice Douglas had said: "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." *Joint Anti-Fascist Refugee Committee v. McGarth*, 341 U.S. 123 (1951).

That the due process clause will strike down procedures that are so vague and standardless that it leaves the public uncertain as to conduct it prohibits or requires, is a

proposition that our courts have long recognized. *Giaccio v. State of Pennsylvania*, 382 U.S. 399 (1966). The right to vote is a personal right, *Reynold v. Sims*, *supra*, and as such it is protected by the due process clause of the Fourteenth Amendment against any state deprivation which does not meet the standards of due process. This protection is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute. *Giaccio v. State of Pennsylvania*, *supra* at 401.

The proceedings to get one's civil rights restored are lengthy, potentially expensive, inconvenient, and humiliating (involving publishing in local newspapers). Is it any wonder that of the number of felons convicted in Florida only less than ten percent apply for a pardon?

If Florida is to give the right to vote to some convicted felons, then the due process clause requires more than the discretionary and discriminatory procedure now used. *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Lanzetta v. State of New Jersey*, 306 U.S. 451 (1939).

Perhaps, most offensive of all is the fact that people are being subjected to a totally discretionary source for the restoration of civil rights *unnecessarily*. There is no "civil death" statute in Florida. In other words, one's civil rights are never explicitly taken away from him upon conviction of a felony. The only references to a convicted felon's civil rights involve how to get them back — but nothing says that they were removed. No law, no statute says that if you are a convicted felon you cannot vote. The laws merely accomplish this end through indirection. By making a statutory and constitutional qualification out of the restoration of civil rights to convicted felons it has been *implied* that such rights are somehow missing without executive clemency. Thus, by implication alone,

the right to vote comes under the pardon power. It is an unnecessary and illegal implication. *See* definition of pardon, *United States v. Wilson*, 32 U.S. 150, 161 (1833) (C. J. John Marshall). A fundamental right, the entree of each citizen into the democratic process, cannot thus be casually lifted from the arsenal of citizenship. *See United States v. Texas*, *supra* at 249-250. When the right to vote is subtracted from citizenship, you are left with something less than citizenship.

Respectfully submitted,

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PROOF OF SERVICE

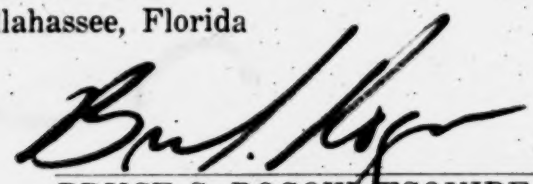
I, BRUCE S. ROGOW, one of the attorneys for Appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of July, 1969, I served copies of the foregoing Jurisdictional Statement upon the several parties thereto, as follows:

MARTIN BRATERMAN, as Supervisor of Registration for Dade County, Florida; CLAUDE KIRK, Governor of the State of Florida and their successors in office,

by mailing a true and correct copy, in a duly addressed envelope, with air mail postage prepaid, to the attorneys of record for these Appellees as follows:

EARL FAIRCLOTH, Attorney General
T. T. TURNBULL,
Ass't Attorney General

JAMES McGUIRK,
Ass't Attorney General
Office of the Attorney General
THE CAPITOL
Tallahassee, Florida



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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 68-748-Civ-JE

Filed May 5, 1969

RUFUS BEACHAM,
on his own behalf and on behalf of all others
similarly situated,

Plaintiffs,

vs.

MARTIN BRATERMAN,
as Supervisor of Registration for Dade County, Florida;

CLAUDE KIRK,
Governor of the State of Florida,
and their successors in office,

Defendants.

OPINION AND ORDER
Before
SIMPSON, Circuit Judge,
ATKINS and EATON, District Judges

EATON, District Judge:

Plaintiff, a convicted felon attempted to register to vote in Dade County, Florida, and was refused the right to register solely because he was a convicted felon whose civil rights had not been restored. He applied for a pardon,

which would have included a restoration of his civil rights, and his application was denied. Neither the Governor of Florida nor members of the State Cabinet have established specific standards to be applied to the consideration of petitions for pardon.

The cause was filed as a class action. However, by agreement of the parties, the matter was heard on stipulated facts, memoranda briefs and oral argument. It was understood by the parties that the procedural steps outlined in Rule 23 (c) (2) and (3), Fed. R. Civ. P., would not be followed. Therefore, the cause has not been maintained as a class action.

The Plaintiff challenges the following Florida constitutional and statutory provisions:

Article IV, Section 8, Florida Constitution, 1969:

> "Clemency.—(a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses."

Article VI, Section 4, Florida Constitution, 1969:

> "Disqualifications.—No person convicted of a felony, or adjudicated in this or any other state to be mentally incompetent, shall be qualified to vote or hold office until restoration of civil rights or removal of disability."

Florida Statute 97.041 (5) (d)

"Qualifications to register

(5) The following persons are not entitled to vote:

(d) Persons convicted of any felony by any court of record and whose civil rights have not been restored."

Florida Statute 940.05

"Pardon restores rights of citizenship

All persons who have received or who may receive full pardon from the board of pardons shall be entitled to all the rights of citizenship enjoyed by them before their conviction, whether the pardon is granted before or after the expiration of the sentence or payment of the penalty."

He says that each violates the rights of citizenship, equal protection of law and due process of law secured by the 14th Amendment to the Constitution of the United States. He seeks to enjoin the Supervisor of Registration for Dade County, Florida, from enforcing those Florida constitutional and statutory provisions. As an alternative to an injunction entered against the Supervisor of Registration, Plaintiff seeks to enjoin the Governor of Florida from continuing to grant and deny petitions for pardons in a purely discretionary manner without resort to specific standards which are not more stringent than those required of registrants who have not been convicted of a felony.

During oral argument counsel for the Plaintiff stressed that the attack here is upon the constitutional and statutory provisions and not upon the pardon power itself. However, for all practical purposes, Florida's right to disenfranchise convicted felons is being challenged and the discretionary exercise of the pardon power by the executive branch of Florida's government is being challenged.

1. The initial question before the Court is whether a state may constitutionally exclude from the franchise persons otherwise qualified to vote who have been convicted of a felony. We hold that the state may do so and that the Florida constitutional and statutory provisions which effect that exclusion are valid.

The second Circuit Court of Appeals in *Green v. Board of Elections of the City of New York*, 380 F.2d 445 (1967), *cert. den.* 389 U.S. 1048, recently addressed itself to that question and decided that it presented an insubstantial issue which did not require the convening of a three judge court. We agree with that Court that "even though the precise issue has not arisen before the Supreme Court, the propriety of excluding felons from the franchise has been so frequently recognized — indeed put forward by the Justices to illustrate what the states *may* properly do — that such expressions cannot be dismissed as unconsidered dicta." (Emphasis theirs.) See such expressions in *Davis v. Beason*, 133 U.S. 333, 346-347, 10 S.Ct. 299, 33 L.Ed. 637 (1890); *Estep v. United States*, 327 U.S. 114, 122 fn. 13, (1946); *Trop v. Dulles*, 356 U.S. 86, 96-97, 78 S.Ct. 590, 2 L.Ed. 2d 630 (1958) (Warren, C.J.); *Lassiter v. Northampton County Board of Elections*, 360 U.S. 45, 51, 79 S.Ct. 985, 3 L.Ed. 2d 1072 (1959) (Douglas, J.); *Gray*

v. Sanders, 372 U.S. 368, 380, 83 S.Ct. 801, 9 L.Ed.2d 821 (1963) (Douglas, J.); and *Harper v. Virginia State Board of Elections*, 383 U.S. 663, 673, 675 n.4, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966) (dissenting opinion of Black, J.).

II. The succeeding question is whether it is a denial of equal protection of law and due process of law for the Governor of Florida, with the approval of three members of the Cabinet, to restore discretionarily the right to vote to some felons and not to others. We hold that it is not. The restoration of civil rights is part of the pardon power and as such is an act of executive clemency not subject to judicial control.

The discretionary power to pardon has long been recognized as the peculiar right of the executive branch of government. *United States v. Wilson*, 32 U.S. (7 Pet.) 150 (1833); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1866); *Ex Parte Grossman*, 267 U.S. 87 (1925); *United States v. Benz*, 282 U.S. 304 (1931); *Solesbee v. Balkcom*, 339 U.S. 9 (1949), *reh. den.* 339 U.S. 926 (1950).

The Courts of Appeals for several circuits have stressed the freedom of the executive pardon power from judicial control. *Biezel v. United States*, 139 F.2d 153 (6th Cir. 1943), *cert. den.* 321 U.S. 800 (1944), *reh. den.* 322 U.S. 768 (1944); *Yelvington v. Presidential Pardon & Parole Attorneys*, 211 F.2d 642 (D.C.Cir. 1954); *Bishop v. United States*, 223 F.2d 582 (D.C.Cir. 1955), *rev'd on other grounds without opinion*, 350 U.S. 961 (1956); *United States v. Patti*, 291 F.2d 745 (3rd Cir. 1961); and *Davis v. State of North Carolina*, 339 F.2d 770 (4th Cir. 1964), *rev'd on other grounds*, 384 U.S. 737 (1966).

The Fifth Circuit Court of Appeals case of *Murray v. State of Louisiana*, 347 F.2d 825 (1965) is persuasive. There the Court found no violation of the equal protection clause where the State of Louisiana refused to give the same effect to a pardon granted by the State of Missouri that it would have given to its own pardon. Circuit Judge Gewin wrote for the Court that pardons "are not granted as a matter of right, but as an act of grace."

The historic executive prerogative to grant a pardon as an act of grace has always been respected by the Courts. Where the people of a state have conferred unlimited pardon power upon the executive branch of their government, the exercise of that power should not be subject to judicial intervention.

Accordingly, it is ordered that the relief sought in the complaint is denied and this cause is dismissed. Defendant's costs, if any, may be taxed by the Clerk upon appropriate motion. This opinion and order constitutes the final judgment herein.

DONE and ORDERED at Miami, Southern District of Florida, this 30th day of April, 1969.

s Bryan Simpson
BRYAN SIMPSON
United States Circuit Judge

C. CLYDE ATKINS
United States District Judge

JOE EATON
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 68-748-Civ-JE

Filed September 3, 1968

RUFUS BEACHAM,
on his own behalf and on behalf of all others
similarly situated,

Plaintiff,

vs.

MARTIN BRATERMAN, etc., et al.,

Defendants.

ORDER

Plaintiff applied to this Court on his own behalf and on behalf of all others similarly situated for an order to convene a Three Judge Court pursuant to 28 U.S.C. §2281 and §2284 for a hearing and determination of his application for a declaratory judgment and for preliminary and permanent injunction.

On August 26th, 1968, this Court heard oral argument on the jurisdictional question of whether the constitutional question raised is substantial and on Defendants' motion to dismiss the complaint. Memoranda briefs, submitted prior to oral argument, have been considered by the Court.

Therefore, having been advised in the premises, it is

ORDERED AND ADJUDGED that:

1. The Court has jurisdiction of the cause.

2. Defendants' motion to dismiss Plaintiff's complaint is denied.

3. Plaintiff's application for injunction is required to be heard and determined by a Three Judge Court in accordance with 28 U.S.C. §2281.

If 97.041 (5) (d) of the Florida Statutes read in total, "Persons convicted of any felony by any court of record," this Court would have no jurisdiction to entertain this matter. If such were the case, there would be no substantial constitutional question presented.

However, when §97.041 (5) (d)*, Article 4, §12 of the Florida Constitution and §940.05 of the Florida Statutes are considered in light of the allegations in the complaint, a substantial constitutional question is presented.

DONE AND ORDERED at Miami, Southern District of Florida, this 30 day of August, 1968.

JOE EATON

United States District Judge

cc: William D. duFresne, Esq.
Joseph A. Sole, Esq.
St. Julien P. Rosemond, Esq.

*"Persons convicted of any felony by any court of record and whose civil rights have not been restored." (underlining by the Court).

APPENDIX C

Fla. Const. Art. 4, §8:

Section 8. CLEMENCY.—

(a) Except in cases of treason and in cases where impeachment results in conviction, the governor may, by executive order filed with the secretary of state, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the cabinet, grant full or conditional pardons, restore civil rights, commute punishment, and remit fines and forfeitures for offenses.

(b) In cases of treason the governor may grant reprieves until adjournment of the regular session of the legislature convening next after the conviction, at which session the legislature may grant a pardon or further reprieve; otherwise the sentence shall be executed.

(c) There may be created by law a parole and probation commission with power to supervise persons on probation and to grant paroles or conditional releases to persons under sentences for crime. The qualifications, method of selection and terms, not to exceed six years, of members of the commission shall be prescribed by law.

Fla. Const. Art. 6, §4:

Section 4. DISQUALIFIED PERSONS.—

No person under guardianship, non compos mentis or insane shall be qualified to vote at any election, nor shall any person convicted of felony by a court of record be qualified to vote at any election unless restored to civil rights.

Fla. Stat. §940.05. PARDON RESTORES RIGHTS OF CITIZENSHIP.—

All persons who have received or who may receive full pardon from the board of pardons shall be entitled to all the rights of citizenship enjoyed by them before their conviction, whether the pardon is granted before or after the expiration of the sentence or payment of the penalty.

Fla. Stat. §97.041. QUALIFICATIONS TO REGISTER.—

(1) Any person twenty-one (21) years of age or any person who will attain age twenty-one (21) prior to the next succeeding primary special primary, general or special general election, upon proof of his birthdate, who is a citizen of the United States, a permanent resident living in Florida for one (1) year, residing in the county where he wishes to register for six months, is eligible to register with the supervisor when the registration books are open.

(2) A person who has not attained the age of twenty-one (21) at the time the registration books close, but who will attain such age prior to the next succeeding primary, special primary, general or special general election and meets the other requirements of subsection (1) above, may register during the sixty (60) days prior to the closing of the registration books next preceding his twenty-first (21) birthday.

(3) A person who has not fulfilled his residency requirements at the time the registration books close, but who will fulfill such residency requirements prior to the next succeeding primary, special primary, general or special general election and meets the other requirements of subsection (1) above or comes within the purview of subsection (2) above may register during the sixty (60) days prior to the closing of the registration books next preceding the date on which his residency requirements will be fulfilled.

(4) When any person presents himself to register and there is any question regarding his qualifications the supervisor may require satisfactory proof of his qualifications.

(5) The following persons are not entitled to vote:

(a) Persons not registered.

(b) Persons under guardianship or confined in any state prison.

(c) Persons adjudicated mentally incompetent in this or any other state and who have not had their competency restored pursuant to law.

(d) Persons convicted of any felony by any court of record and whose civil rights have not been restored.

IN THE

Supreme Court of The United States

OCTOBER TERM, 19[illegible]

NO. 101

RUFUS BRAHAM

Appellant

MARTIN BRAVERMAN, et al

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

EARL FAIRCLOTH
Attorney General

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ATTORNEYS FOR APPELLEES

TABLE OF CITATIONS

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Art. X, § 10, Fla. Const. 1968

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[illegible] Extradition, 1 S.

[illegible] Pardons, 1 S.

1 14th Amendment

2 14th Amendment

30 Am. Jur. 2nd Pardon, Reprieve, and Amnesty § [illegible]

30 ALR Judicial Investigation of Pardon by Governor 2d 341. Supp. 65 ALR 1471

The Equal Protection Clause as a Limitation on the State's Power to Discriminate Those Convicted of a Crime, 71 Rutgers L. Rev. 207, 1180 n.140

Rule 10(e), Revised Rules of the Supreme Court of the United States

IN THE

Supreme Court of The United States

OCTOBER TERM, 19 69

NO. 101

RUFUS BRACHAM,
Appellant,

v.

MARTIN BRAVERMAN, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

MOTION TO AFFIRM

The Appellees, pursuant to Rule 16 (c) of the Revised Rules of the Supreme Court of the United States, move to affirm the appeal herein on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

The Appellee's argument in support of this Motion to Affirm will be developed under the following two points:

POINT I

Was the federal court below proper in its ruling that Florida had the power to deprive the Appellant of his right to vote, in consequence of his valid felony convictions?

POINT II

Did the court below properly rule it had no authority to review the basis or propriety of the Florida Pardon Board's refusal to grant a pardon to the Appellant?

ARGUMENT

POINT I

Was the federal court below proper in its ruling that Florida had the power to deprive the appellant of his right to vote in consequence of his valid felony convictions?

The thrust of the Appellant's contention here is that Florida's taking of the right to vote on the basis of a felony conviction creates a classification offensive to the Due Process and Equal Protection clauses of Section 1 of the 14th Amendment, as interpreted and given vigor by such recent opinions of this Court as *Reynolds v. Sims* (1964), 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 and *Harper v. Virginia Board* (1966), 383 U.S. 663, 15 L.Ed.2d 675, 86 S.Ct. 1079.

It is respectfully submitted the following points demonstrate the utter lack of substance to the Appellant's argument.

1. The Appellant relies on Section 1 of the 14th Amendment, and ignores both the clear wording and history of Section 2 of the same Amendment.

Section 2 of the 14th Amendment on its face excludes from the purview of Section 1 citizens whose right to vote has been abridged for participation in rebellion, or other crime.

It is suggested Section 2 clearly acknowledges the right of states to exclude from voting all persons convicted of crimes. It would be absurd to argue that this language was intended to deprive the states of this right, particularly in view of the fact that at the time of passage of the 14th Amendment, no less than 29 states were excluding from the vote persons convicted of crimes. *Green v. Board of Elections*, 16 A.2d, 19(2d Cir. 1965) 380 F.2d 445. That the history of the 14th Amendment contradicts the Appellant's position is acknowledged, in a somewhat perverse manner, by the very law review writer whose arguments the Appellant has cited to this Court. In Note, the Equal Protection Clause as a Limitation on the State's Power to Disenfranchise Those Convicted of a Crime, 21 Rutgers L. Rev. 291, 318-9, n. 140, the author argues the specific language of Section 2 be ignored because it "does not seem to serve any purpose," and also suggests an interpretation of this section not based on history because "the Court seems to have completely disregarded historical interpretations of the equal protection clause with respect to voting rights anyway."

2. Even after intense scrutiny, no federal court has considered this issue raises a substantial federal question. In *Green v. Board of Elections*, supra, the Second Circuit Court of Appeals considered precisely this issue and in an extensive opinion which is often cited for its exposition on what constitutes a substantial federal question, determined that this issue does not present one. The opinion of the Three Judge Court below cites the unbroken line of cases of this Court since 1880 which have acknowledged the right of the states to exclude persons convicted of a crime from voting, and the order of the court below convening a Three Judge Panel also held this issue did not present a substantial federal question. (See Appendix B to Appellant's Jurisdictional Statement).

Article X, Section 10, Fla Const., 1969

> "Felony, definition.—The term 'felony' as used herein and in the laws of this state shall mean any criminal offense that is punishable under the laws of this state, or that would be punishable if committed in this state, by death or by imprisonment in the state penitentiary."

The above quoted provisions clearly establish:

A. All persons adjudged guilty of felonies lose their right to vote in Florida.

B. The loss of the right to vote in Florida by reason of a felony conviction is automatic upon adjudication of guilt.

C. The phraseology of Section 97.041 (2) (d), F.S., is subject to two criticisms. The Appellant apparently reads the phrase "and whose civil rights have not been restored" to indicate that some persons adjudged guilty of crimes do not lose their civil rights while others do. This is simply not true. The phrase simply acknowledges the pardon power, the fact that a person who has received a full pardon, may vote, just as he may hold public office, avoid the consequences of perjury, or, for that matter, walk freely out of prison.

Furthermore, it is obvious that all of Section 97.041 (2) (d) is irrelevant and redundant, in view of the mandatory, self-executing character of Article IX, Section 1, Florida Constitution, 1969, quoted above.

D. Much of the appellant's argument rests on the assumption that right to vote cases such as *Carrington*, *supra*, have unlimited scope, that there is no restriction to the application of such broad statements as the comment:

> Leaving out from the franchise a sector of the population because of the way they may vote is constitutionally impermissible," *Carrington v. Rash*, *supra*, 13 L Ed 2d at 679.

Yet, it is obvious, such comments do have their rational limits. The Appellant would probably not care to argue that the states do not have the authority to "leave out" from the right to vote, all 10 year old children.

it is obvious they are not allowed to vote precisely because of "the they may vote" and because the states' right to exclude them from franchise is also a fact of history acknowledged by Section 2 of the Amendment. Indeed, if the argument is shifted to 18 year olds, the ple becomes even more illustrative.

is unnecessary to merely speculate on the obvious limits to these ies. These limits were acknowledged by this Court in [illegible] erson (1966), 384 U.S. 24, 16 L.Ed.2d 376, 86 S.Ct. 1380:

> "Neither in Reynolds v. Sims, nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." Burns v. Richardson, supra, 384 U.S. at [illegible] (Emphasis added)

POINT II

> That the court below properly ruled it had no authority to review the bases or propriety of the Florida Pardon Board's refusal to grant a pardon to the Appellant.

a preliminary matter, it should be noted that the Pardon Power of da is vested in seven men, the Governor and six Cabinet members whom are individually elected on a state-wide basis and all of whom executive responsibility for governing the state. Article 4, Section 8 da Constitution, 1968. For purposes of convenience the Appellee refer to this group as the "Florida Pardon Board," although as a tical matter, the power of executive clemency is exercised in Florida y a "Pardon Board," as such, but by the Governor with whom must n three of the six Cabinet members. The important point is that the rida Pardon Board" is not, and never has been, an administrative y created by, or subject to, legislative mandate. The pardon power in da is wholly a matter of constitutional creation, and is not subject to ative control. [illegible] v. State, (Fla. 1899), 37 So. 21.

The Appellant has sought to treat the restoration of civil rights as not a valid element of the Pardon Power. Florida has always treated the restoration of civil rights as simply one effect of a pardon, no different from the authority to commute a death sentence to life, or to entirely obliterate a conviction and turn an imprisoned man loose restored to all the rights and attributes of citizenship. *Opinion of Court*, (1872), 14 Fla. 318; *Singleton v. State*, supra; *Page v. Watson*, (Fla. 1938), 192 So. 205; *Ryan v. Burch*, (Fla. 1934), 154 So. 128; In re *Florida Board of Bar Examiners*, (Fla. 1966), 183 So.2d 688.

The Appellant has characterized the above case law of Florida a mere "labeling act" by which the state has claimed as a concommitant of the judicially unreachable Pardon Power something that really doesn't belong there.

It is perhaps unfortunate for the appellant's argument that it is the Florida Pardon Power under challenge, because it happens that in the seminal opinion which so construed Florida's Pardon Power, the Supreme Court of Florida reached this result simply by adopting this Court's construction of the Presidential Pardon Power.

> "When the pardon is full, it remits the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction it removes the penalties and disabilities and restores him to all his civil rights. It makes him as it were a new man, and gives him a new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited or property or interests vested in others in consequence of the conviction and judgment." (Ex parte Garland, 4 Wallace, 380)
>
> "Thus is the language of the Supreme Court of the United States when determining the effect of a full pardon by the President of the United States. There is nothing in the Constitution or laws of this State to vary its effect here." Opinion of Court, supra, at 319.
>
> (Emphasis added)

It is also notable that until Florida's present Constitution became effective in 1969, the Florida Constitutional Language creating and vesting the Pardon Power in a "Pardon Board" did not even refer to authority to restore civil rights, Article IV, Section 12, Florida Constitution, 1885, and it was only the case law of Opinion of the Court and *Ex parte Godwin*, supra, that indicated this "power" existed.

The Appellant appears to suggest that merely by granting a pardon to one person, thereby restoring his right to vote, the Pardon Board creates "unequal classes." This is quite true. As a practical matter, it is impossible to exercise the Pardon Power in any other manner, inasmuch as pardons do reflect executive clemency granted a single person rather than to entire classes (except in the unusual instance of amnesties). Consequently, any judicial requirement that restoration of the right to vote to one person creates a "right" to the same treatment of another felon will necessarily make the Pardon Power unworkable and put an end to it.

Courts in every jurisdiction, federal and state, have consistently held that the Pardon Power is an executive function no more subject to judicial review than is the authority of the President to deliver a State of the Union message to Congress. A pardon is possibly -- not always -- subject to question on the basis that the executive issuing it was not actually in office and empowered to deliver it at the time, or perhaps on the basis that the applicant for a pardon practiced fraud on the executive authority. These are the only bases for judicial review. In addition to the extensive case authority for this cited by the court below, see also 39 Am.Jur. Pardon, Reprieve and Amnesty, Sections 1-4, 12-17, 24, 33, 42, 43; 67 C.J.S. Pardons, Section 1-6; 30 ALR Judicial Investigation of Pardon by Governor, 238, 241, Supp. 65 ALR 1471.

Furthermore, assuming Appellant's right to vote was properly taken from him by reason of his felony conviction, the only way it can be restored is by an affirmative action of the Pardon Board. If the Pardon Board does nothing, the Appellant has not regained his right to vote.

Consequently, the Appellant is apparently asking the courts to mandamus the Governor and three other members of the Florida Pardon Board. Even if the act requested were not discretionary, and surely the decision of whether to bestow mercy is just that, the federal judiciary has refused to mandamus a Governor even where the duty to act was ministerial and created by the extradition clause of the United States Constitution. *Kentucky v. Dennison*, (1860), 24 How. 66, 65 U.S. 66, 16 L.Ed.2d 717; *Application of Middlebrooks*, (D.C. Cal. 1950), 88 F.Supp. 943, reversed on other grounds, *Ross v. Middlebrooks*, (C.A. 9, 1951), 188 F.2d 308, cert. den. *Middlebrooks v. Ross*, (1951), 72 S.Ct. 90, 342 U.S. 862, 96 L.Ed. 649; 35 C.J.S. Extradition, Section 4.

Even preliminary to any mandamus, the appropriate court would obviously have to require the Florida Pardon Board to explain the basis for its decision not to grant the Appellant a pardon. Then the court would presumably examine the reasons given by one of two sets of standards. The court could, of course, develop its own indicia of what constitutes a proper basis for "mercy," with the benefit of whatever guidance is afforded by the term "due process." Such an approach would simply substitute the judgment of a given federal judge for that of the Governor. The one other alternative would be to use the Pardon Board's own basis for one pardon as requiring the same treatment under the equal protection clause for another. This would put the federal courts in the position of examining a process very similar to the manner in which juries reach their verdicts.

The Appellant suggests it is offensive that the civil right of voting is subject to restoration on an arbitrary basis. But if this is offensive, consider how much more repugnant is the fact that the death penalty itself is subject to precisely the same arbitrariness. Surely there is no more "fundamental freedom," no more "preferred right" than that to life itself.

Imagine the range of factors -- conscious and subconscious, articulated and otherwise, that influence the decision of each individual member of the Florida Pardon Board on whether to commute a death sentence to life imprisonment.

Counsel is personally familiar with at least one instance where the simple credibility of a petitioner for a pardon was a major factor in the

decision of the Florida Pardon Board. How can such matters be made the basis of judicial review?

It is respectfully submitted that as a matter of simple good policy and judgment, it would be entirely unreasonable for the courts to attempt to police the pardon process.

All of these policy arguments simply underscore the soundness of the extensive legal authority cited by the court below for the doctrine that the courts do not have the power to invade the province of the executive and subject the Pardon Power to judicial review. Nor has the appellant cited a single authority for the argument that the judiciary does have the power of review over the Pardon Power. The ultimate answer to the Appellant's challenge is that the Pardon Power exists, and may be wielded in an arbitrary fashion not subject to judicial control, because that is precisely what the people willed in creating both the Presidential Pardon Power and the Florida Pardon Power.

CONCLUSION

The authority of a state to take the right to vote by reason of conviction of a crime and the right of a Pardon Board to refuse to restore this right have always been acknowledged by this court.

It is respectfully submitted it is manifest the Appellant has not presented a substantial challenge to these principles and, consequently, this Court should grant this Motion to Affirm.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

T. T. TURNBULL
Chief Trial Counsel

JAMES MCGUIRK
Assistant Attorney General

COUNSEL FOR THE APPELLEE

The CAPITOL
Tallahassee, Florida 32304

PROOF OF SERVICE

I, T.T.TURNBULL, one of the attorneys for the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of August, 1969, I served copies of the Foregoing Motion to Affirm upon the Appellant thereto, as follows:

RUFUS BEACHAM, on his own behalf and on behalf of all others similarly situated,

by mailing a true and correct copy, in a duly addressed envelope, with first-class postage prepaid, to the attorneys of record for this Appellant as follows:

ELIZABETH J. du FRESNE, ESQUIRE
WILLIAM D. du FRESNE, ESQUIRE
BRUCE S. ROGOW, ESQUIRE
ECONOMIC OPPORTUNITY LEGAL SERVICES PROGRAM, INC.
622 N. W. 62 Street
Miami, Florida 33147

SUPREME COURT OF THE UNITED STATES

October Term, 1969.

BEACHAM *v.* BRATERMAN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 404. Decided October 20, 1969.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.